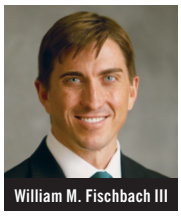
LEGAL REVIEW

‘Speak Now or Forever Hold Your Peace’

New court rulings make post-trustee’s sale lawsuits more difficult in Arizona

BY WILLIAM M. FISCHBACH, III

Two recent cases will make it more difficult to bring lawsuits after a trustee’s sale in Arizona. The two cases are *BT Capital, LLC v. TD Serv. Co. of Arizona*, 229 Ariz. 299, 275 P.3d 598 (2012), and *Madison v. Groseth*, 230 Ariz. 8, 279 P.3d 633 (App. 2012). Both cases address the operation of Arizona Revised Statute Section 33-811(C). That statute states in relevant part: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> The trustor, its successors or assigns, and all persons to whom the trustee mails a notice of sale under a trust deed … shall waive all defenses and objections to the sale not raised in an action that results in the issuance of a court order [halting the sale] … on the last business day before the scheduled date of the sale.

Section 33-811(C) became law in 2003. *BT Capital* and *Madison* are the first authoritative cases explaining the application of Section 33-811(C).

In *BT Capital*, two trustee’s sales of a commercial property had occurred on the same day, each with a different winning bidder. The successful bidder at the second sale, BT Capital, had filed a lawsuit against the successful bidder of the first sale, Point Center Financial (“PCF”). BT Capital’s lawsuit was unsuccessful, and while its case was on appeal, there was a third trustee’s sale at which PCF was the winning bidder. The Arizona Supreme Court held BT Capital’s appeal was moot under Section 33-811(C) because BT Capital did not obtain a court order halting the third and final sale. The Court read Section 33-811(C) broadly, holding that BT Capital’s appeal was a post-sale challenge barred by Section 33-811(C).

In *Madison*, there had been a trustee’s sale on the borrower’s property, and the borrower did not get a court order halting the sale the day prior. After the sale, the borrower filed a lawsuit alleging fraud and other tort claims against the bidder that purchased the property at the trustee’s sale. The Court of Appeals found the borrower’s tort claims depended on her “objections to the validity of the trustee’s sale.” Because the borrower had not obtained a court order halting the sale, the Court of Appeals held she had “waived those objections,” thus terminating her tort claims.

BT Capital and *Madison* demonstrate that Section 33-811(C) means what it says: If a borrower or other party with notice of a trustee’s sale does not get a court order halting the sale, it waives **all** defenses and objections to the sale. In other words, “Speak now, or forever hold your peace.”

Nevada Foreclosure Legislative Update

BY GREGORY L. WILDE


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In the last two legislative sessions, Nevada legislators radically altered foreclosure requirements, making it extremely difficult for residential lenders to foreclose.

A foreclosure in Nevada is initiated by recording a Notice of Default (“NOD”). For years, Nevada has led the nation in foreclosures, but the number of NODs dropped over 95% in October 2011, when Nevada Assembly Bill 284 took effect. This Bill requires lenders to record, prior to the NOD, an affidavit of personal knowledge detailing many items, including but not limited to, the ownership history of the loan. Violators of this requirement face a $5,000 fine and potential criminal charges. Eleven months later, lenders have only recently begun to test the waters and initiate foreclosures.

The previous effort to curb foreclosures was in 2009 when the Nevada legislature implemented a Foreclosure Mediation Program. If a homeowner elects mediation, the foreclosure is stayed and the lender is required to meet and discuss a loan modification or other arrangements. If an agreement is not reached, and the lender wants to proceed with foreclosure, the mediator decides if the lender strictly complied with all program requirements. Any non-compliance results in cancellation of the foreclosure. In contrast, the homeowners need only use their best efforts to comply and there is no mention of a penalty.

If the foreclosure survives mediation, but the homeowner is not pleased with the mediation result, the homeowner can file a Petition for Judicial Review with the District Court. This stays the foreclosure again without requiring the homeowner to seek an injunction or post a bond while waiting for the Petition to be decided.

If the lender prevails at the petition level and the homeowner is not pleased with the result, the homeowner can appeal the decision to the Nevada Supreme Court. This also stays the foreclosure without requiring the homeowner to seek an injunction or post a bond while waiting for a decision on appeal. These three “stays” of the foreclosure allow a homeowner to remain in a property for several months, or even years, without making any payments to the lender.

There is no written legislative, legal, or procedural authority providing for injunctive relief after the mediation. It is an assumed byproduct not addressed yet by the Nevada legislature. From an objective point of view, the biased mediation rules and gratis injunctive relief are contrary to the notions of due process and general fairness.

The Arizona legislature recently considered a similar mediation program, but did not adopt it. The boom and bust of the Nevada and Arizona real estate markets, along with their foreclosure rates, were almost mirror images of each other until shortly after Nevada adopted its mediation program. Interestingly enough, property values in Arizona have continually increased since 2010 while Nevada’s values are declining and sales remain stagnant.

Hopefully Nevada’s judiciary, 2013 legislators, and mediators can be objective in their decision making process. Allowing legitimate foreclosures will assist eventually in stabilizing the real estate market. Postponing the inevitable only adds to the many problems stalling Nevada’s economic recovery.